Hock Seng Lee Timber Sdn Bhd v Yii Chi Hau & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(NCC)(A)-1127–06 OF 2016

TENGKU MAIMUN, BADARIAH SAHAMID AND KAMARDIN HASHIM JJCA

B

12 JANUARY 2017

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Companies and Corporations — Winding up — Opposition to petition — Company's affidavit to oppose winding up petition filed outside time prescribed under r 30(1) of the Companies (Winding-Up) Rules 1972 ('the Rules') — Company's counsel orally applied, and later filed formal application, for extension of time — High Court allowed petition without hearing merits nor hearing applications for extension of time — Whether court's decision prejudiced and caused great injustice to company — Whether court had general powers to abridge time under rr 193 and 194 of the Rules — Whether rr 193 and 194 did not say application for extension of time must be made before hearing of winding up petition

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The respondents, claiming to be contributories of the appellant, filed a petition under s 218(1)(f) and/or s 218(1)(i) of the Companies Act 1965 ('the CA') to wind up the appellant on the ground its directors were conducting the affairs of the company in their own interests and had deprived the respondents of their right to equal participation in the management and affairs of the company. The petition was first fixed for hearing on 25 April 2016. Seven days earlier, the appellant's solicitors (on whom the petition was served on 11 April 2016) filed a notice of intention to oppose the petition and wrote to the High Court for the hearing of the petition to be adjourned so that they could file an affidavit in opposition. Despite the appellant's objection to the request for adjournment, the court adjourned the hearing to 27 April 2016. The appellant filed the affidavit to oppose the petition ('encl 31') on 22 April 2016. At the hearing of the petition on 27 April 2016, the respondents asked for an order in terms of the petition, submitting that encl 31 should be disregarded because it failed to comply with the time limit prescribed under r 30(1) of the Companies (Winding-Up) Rules 1972 ('the Rules'). The appellant's counsel orally applied for extension of time for encl 31 but the Court adjourned the hearing of the petition. The following day, the appellant filed a formal application ('encl 39') under rr 193 and 194 of the Rules to abridge/enlarge time for encl 31. At the adjourned hearing of the petition, the High Court allowed the petition without hearing its merits and without hearing encl 39 on the ground encl 31 did not comply with r 30(1) of the Rules. The instant appeal was against the High Court's decision.

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Held, allowing the appeal, setting aside the decision of the High Court, and remitting the petition back to the High Court to be heard on its merits:

(1) The High Court's failure to consider the appellant's oral application and/or encl 39 caused prejudice and great injustice to the appellant which warranted appellate intervention. It was the bounden duty of the High Court to have considered the oral application and/or encl 39 as any delay in the hearing of same could not have occasioned a failure of justice to the respondents (see para 40).

(2) In exercising her discretion, the High Court judge failed to judicially consider various material facts — that at the hearing of the petition, the appellant's counsel had, in fact made an oral application for extension of time; that rr 193 and 194 of the Rules did not state that such application must be made before the hearing of the petition and that the Federal Court in *Kilo Asset Sdn Bhd v Hew Tai Hong* [2016] 1 MLJ 785 did not limit its ratio to applications filed before the hearing of a winding up petition and, therefore, the judge had acted against the principle of stare decisis in limiting the ratio of the Federal Court in that case (see para 39).

(3) The High Court judge's reliance on the Court of Appeal's decision in *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 was misplaced as the said decision was only limited to its facts and could not be applied to a winding up petition under s 218(1)(i) as was the case at hand (see para 37).

(4) On the facts and circumstances of this appeal, namely given the various applications and on-going trial on the dispute amongst the Yii/Yu family, justice of the case was best served if the winding up petition was heard on its merits (see para 41).

[Bahasa Malaysia summary

Responden-responden, mendakwa sebagai penyumbang kepada perayu, memfailkan petisyen di bawah s 218(1)(f) dan/atau 218(1)(i) Akta Syarikat 1965 ('AS') untuk menggulung perayu atas alasan pengarah-pengarahnya menjalankan hal ehwal syarikat bagi kepentingan mereka dan telah menafikan responden-responden kepada hak mereka terhadap penyertaan sama rata dalam pengurusan dan hal ehwal syarikat. Petisyen ditetapkan untuk pendengaran pada 25 April 2016. Tujuh hari terdahulu, peguam-peguam perayu (yang diserahkan dengan petisyen tersebut pada 11 April 2016) memfailkan notis niat untuk menentang petisyen dan menulis kepada Mahkamah Tinggi untuk pendengaran petisyen tersebut ditangguhkan dengan itu mereka dapat memfailkan afidavit menentang. Meskipun bantahan perayu kepada permohonan untuk penangguhan, mahkamah menangguhkan pendengaran kepada 27 April 2016. Perayu memfailkan afidavit untuk menentang petisyen ('lampiran 31') pada 22 April 2016. Semasa pendengaran petisyen pada 27 April 2016, responden-responden meminta untuk perintah

mengikut terma petisyen tersebut, dengan menghujah bahawa lampiran 31 patut dikecualikan kerana ia gagal untuk mematuhi had masa yang ditetapkan di bawah k 30(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah'). Peguam perayu secara lisan memohon bagi pelanjutan masa untuk lampiran 31 tetapi mahkamah menangguhkan pendengaran petisyen tersebut. Hari berikutnya, perayu memfailkan permohonan rasmi ('lampiran 39') di bawah kk 193 dan 194 Kaedah-Kaedah untuk menyingkatkan/menambahkan masa untuk lampiran 31. Pada pendengaran penangguhan tersebut, Mahkamah Tinggi membenarkan petisyen tersebut tanpa mendengar meritnya dan tanpa mendengar lampiran 39 atas alasan lampiran 31 tidak mematuhi k 30(1) Kaedah-Kaedah. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, dan meremit petisyen kepada Mahkamah Tinggi untuk didengar atas meritnya:

(1) Kegagalan Mahkamah Tinggi untuk mempertimbangkan permohonan lisan perayu dan/atau lampiran 39 menyebabkan prejudis dan ketidakadilan kepada perayu yang mewajarkan campur tangan mahkamah rayuan. Ia adalah tugas terikat Mahkamah Tinggi untuk mempertimbangkan permohonan lisan dan/atau lampiran 39 kerana apa-apa kelewatan dalam pendengarannya tidak akan menyebabkan ketidakadilan kepada responden-responden (lihat perenggan 40).

(2) Dalam menjalankan budi bicaranya, hakim Mahkamah Tinggi gagal untuk secara kehakiman mempertimbangkan pelbagai fakta material — bahawa pada pendengaran petisyen tersebut, peguam perayu telah, sebenarnya membuat permohonan lisan bagi pelanjutan masa; bahawa kk 193 dan 194 Kaedah-Kaedah tidak menyatakan bahawa permohonan sedemikian mesti dibuat sebelum pendengaran petisyen tersebut dan Mahkamah Persekutuan dalam kes *Kilo Asset Sdn Bhd v Hew Tai Hong* [2016] 1 MLJ 785 tidak menghadkan rationya kepada permohonan-permohonan yang difailkan sebelum petisyen penggulungan dan, oleh itu, hakim telah bertindak bertentangan prinsip stare decisis dalam menghadkan ratio Mahkamah Persekutuan dalam kes tersebut (lihat perenggan 39).

(3) Penggantungan hakim Mahkamah Tinggi ke atas keputusan Mahkamah Rayuan dalam kes *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 adalah salah anggap kerana keputusan tersebut hanya terhad kepada faktanya dan tidak boleh digunakan kepada petisyen penggulungan di bawah s 218(1)(i) seperti kes ini (lihat perenggan 37).

(4) Atas fakta dan keadaan rayuan ini, iaitu dengan pelbagai permohonan dan perbicaraan berterusan atas pertikaian di antara keluarga Yii/Yu,

keadilan kes adalah boleh dilaksanakan jika petisyen penggulungan tersebut didengarkan atas meritnya (lihat perenggan 41).]

Notes

For cases on opposition to petition, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1651–1707.

Cases referred to

Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd [1997] 2 MLJ 756, CA (not folld)

Kilo Asset Sdn Bhd v Hew Tai Hong [2016] 1 MLJ 785; [2016] 2 CLJ 365, FC (folld)

Perantara Properties Sdn Bhd v JMC Kelana Square [2016] 5 CLJ 367, CA (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 rr 30(1), 193, 194
Companies Act 1965 ss 218(1)(f), (1)(i), 221(1)

Appeal from: Companies (Winding Up) No KCH-28NCC-5/3 of 2016 (High Court, Kuching)

Alvin Chong (Victor Ng and Ratanah Devi with him) (Idris & Co) for the appellant.

Albert Tang (Andy Tan Tung Sii with him) (Andy & Assoc) for the respondents.

Kamardin Hashim JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the High Court at Kuching which allowed the first and second respondents' winding up petition with costs of RM5,000. We heard the parties on 18 August 2016 whereby we allowed the appeal. We append below our grounds in doing so.

[2] Both the respondents (the petitioners in this winding up petition) are brothers who are the shareholders, contributories and former directors of the appellant's company ('the company'). The respondents filed an application to wind up the company on the ground that its present directors have conducted the affairs of the company in their own interest in a manner which is unfair and unjust and that the respondents had been deprived of their rights to equal participation in the management and affairs of the company.

[3] The appellant is a company registered in Sarawak and is an investment company dealing mainly in timbers and woods for import and export,

manufacturing, planting and other objects as stated in the memorandum of association.

[4] The respondents prayed in their petition for an order that:

(a) the appellant to be wound up under the provisions of the Companies Act 1965 ('the Act');

(b) Wong Ching Yong be appointed as the liquidator of the company;

(c) a declaration pursuant to s 221(1) of the Act that the respondents hold a shareholding of RM25,000 each in the company;

(d) the costs of the petition to be borne by present directors of the company on a full indemnity basis; and

(e) any other order made as shall be just.

BACKGROUND

[5] Factual background of the matter can be traced way back in 1971 when the family business of Yii/Yu siblings started. There were ten siblings in the Yii/Yu family. They were:

(a) Yu Jih Tung (born on 19 May 1944 and passed away on 2 June 1993);

(b) the first respondent, Yii Chi Hau (born on 5 June 1949);

(c) Yu Chee Lieng (born on 10 April 1952 and passed away on 19 April 2012);

(d) Yu Chee Hoe (born on 21 July 1954);

(e) the second respondent, Yii Chee Ming (born on 23 October 1960);

(f) Yii Chee Ping (born on 20 August 1965);

(g) Yii Chee Hiong (born on 15 March 1957);

(h) Yu Chee Hung (born on 6 February 1959);

(i) Yii Chee Yiing (born on 1 November 1962); and

(j) Yii Chee Sing (born on 27 June 1968).

[6] The family business started when Yu Jih Tung and Yu Chee Lieng acquired the partnership of 'Hock Seng Lee (Motor Tongkang)'. Yu Chee Lieng acquired 1/4 share of the partnership on 15 November 1971 and Yu Jih Tung acquired the balance 3/4 share of the partnership on 19 February 1973. The two brothers operated and traded under the style of 'M/S Hock Seng Lee'.

[7] Later, on or around December 1974, Yu Jih Tung (25% shareholding), Yong Siik Ging (37.5% shareholding) and Yu Chee Hoe (37.5% shareholding) formed Hock Seng Lee Development Co.

[8] Both entities, M/S Hock Seng Lee and Hock Seng Lee Development Co flourished over the course of time and subsequently more companies were formed. The appellant is one of the companies formed. Each company had separate shareholding structures.

[9] Hock Seng Lee Development Co was subsequently made a private limited company, ie Hock Seng Lee Development Co Sdn Bhd. The company was publicly listed and was renamed as Hock Seng Lee Bhd ('HSLB'). That was done in 1996. In or around the same year, six brothers of the family formed Hock Seng Lee Enterprise Sdn Bhd ('HSLESB') with equal shareholding of 16.67% each to specifically hold their shares in HSLB. HSLESB was and still is, a majority shareholder in HSLB.

[10] Between 1998 and 2002, the second respondent transferred all his shares in the various companies, including the appellant, to the other siblings and family members. His shares in HSLESB were transferred to the four sisters. There is no dispute to the fact that the second respondent had transferred all his shares in the various companies to the other siblings. The respondents contended that the shares were to be held on trust for the second respondent.

[11] The appellant company is a private limited company which was incorporated on 6 December 1977. At its inception, the shareholders were Yu Jih Tung, Yu Chee Lieng and Bong Jin Sin holding one share each. On 2 July 1981, Bong Jin Sin sold his one share to Yu Chee Hoe. On 5 March 1985 there were share allotment exercise where 149,997 additional shares were allotted with the following result, ie Yu Jih Tung (30,000 shares); first respondent (30,000 shares); Yu Chee Lieng (30,000 shares); Yu Chee Hoe (30,000 shares) and second respondent (30,000 shares).

[12] Yu Jih Tung passed away on 2 June 1993. On 28 April 1999, the 30,000 shares owned by the estate of Yu Jih Tung were transferred to Francis Yu and Richard Yu in equal proportion. On the same date, the second respondent had transferred his 30,000 shares to his cousin, Yu Tung Sing, for a consideration of RM30,000. As the result of the above, the shareholding of the appellant was:

The first respondent	30,000 shares
Yu Chee Lieng	30,000 shares
Yu Chee Hoe	30,000 shares
Yu Tung Sing	30,000 shares
Francis Yu	15,000 shares

Richard Yu	15,000 shares

[13] On 1 September 2004, Yu Tung Sing had transferred his 30,000 shares to Yu Chee Lieng, Yu Chee Hoe and the first respondent in equal proportion for the consideration of RM10,000 for each person. This resulted in the following shareholding:

The first respondent	40,000 shares
Yu Chee Lieng	40,000 shares
Yu Chee Hoe	40,000 shares
Francis Yu	15,000 shares
Richard Yu	15,000 shares

[14] Yu Chee Lieng passed away on 19 April 2012 and on 2 September 2013, Francis Yu and Richard Yu sold their 30,000 shares to Yu Chee Hoe for a consideration of RM30,000. This resulted in the following shareholding:

Yu Chee Hoe	70,000 shares
The first respondent	40,000 shares
Estate of Yu Chee Lieng	40,000 shares

[15] In or around 1998, the Hock Seng Lee group of companies was restructured. As a result, Huten Marine Sdn Bhd and Hock Seng Lee Machinery Sdn Bhd became wholly owned by the appellant. In or around February 2014, the appellant purchased 70% of shares in Megapron Engineering Sdn Bhd ('Megapron') from one, Ting Ing Huong.

[16] On 6 November 2013, the second respondent commenced Originating Summons No KCH-24–163/11 of 2013 to rectify the register of HSLESB to record his name as a shareholder. The second respondent claimed that he was the beneficial shareholder of the shares he had earlier transferred to the four sisters. The said originating summons was ultimately converted to a writ and was ordered to be tried. This led to a series of actions commenced by the respondents and the other brothers. Ultimately, a total of nine winding up petitions and suits involving the various companies were filed.

[17] One of the suits was commenced by Ting Ing Houng, the former shareholder of Megapron vide Civil Suit No KCH-22NCVC-14/3 of 2014. In the said suit, Ting Ing Houng contended that the 70% shares he held in Megapron was wrongfully transferred to the appellant. He claimed that the shares were held on trust for the second respondent.

[18] All nine suits were ordered to be consolidated and tried together ('the consolidated suits'). The trial had commenced on 23 March 2015 and as at the hearing of the appeal, was ongoing. The crux of the respondents' position in the

said trial is that the second respondent is a beneficial shareholder in all the Hock Seng Lee Group companies as it was the intention of the father that each brother benefit from the proceeds of all the companies equally, ie one-sixth share each. The other side, led by Yu Chee Hoe ('Yu Chee Hoe's side'), contended that no such family agreement existed as each company had a specific shareholding structure. The second respondent had, in any event, renounced his rights as a shareholder when he transferred his shares between 1998 and 2002.

THE WINDING UP PETITION

[19] The petition was filed under s 218(1)(f) and/or s 218(1)(i) of the Act on 24 March 2016. The respondents were not directors of the appellant at the time the petition was filed. The respondents filed the petition as contributories of the appellant. The second respondent claimed to be a contributory on the basis that Yu Tung Sing was to hold the 30,000 shares in trust for him.

[20] The respondents' grounds for filing the petition was essentially that, Yu Chee Hoe's side were running the affairs of the appellant in their own interest and that the respondents had been deprived of their rights to equal participation in the management and affairs of the appellant.

[21] On 29 March 2016, the respondents filed an application to appoint a provisional liquidator ('encl 3'). The appellant had filed an affidavit to oppose encl 3 on 22 April 2016 ('encl 6').

[22] The petition was served on the appellant on 1 April 2016. It was then served on the then solicitors for the appellant, Messrs Thomas, Shankar Ram & Co, on 11 April 2016.

[23] The court's computerisation system automatically scheduled the hearing of the petition on 25 April 2016. On 18 April 2016, the appellant filed a notice of intention to oppose the petition ('encl 11'). On the same day, the appellant's then solicitors, by way of a letter, had informed the High Court that the appellant will file an affidavit to oppose the petition on 25 April 2016. The then solicitors for the appellant explained that the affidavit was almost ready but they needed time as the exhibits were voluminous ('encl 15'). The then solicitors for the appellant had also sought for an adjournment of the hearing of the petition by way of its letter dated 18 April 2016.

[24] The respondents' solicitors, by way of its letter dated 20 April 2016, had objected to the appellant's request for an adjournment. The Kuching High Court had decided to adjourn the hearing of the petition to 27 April 2016 on the same day.

[25] On 22 April 2016, the appellant had filed an affidavit to oppose the petition ('encl 31'). Enclosure 31 contained approximately 2192 pages. The documents exhibits were the same documents/cause papers used in the consolidated trial. The appellant opposed the petition on the ground that the respondents had filed the petition in bad faith and with unclean hands. The appellant is a financially healthy company with profit making subsidiaries.

[26] On 25 April 2016, the appellant filed an application to consolidate the petition with the consolidated suits ('encl 27'). The facts and issues in the petition were substantially similar to the consolidated suits. The appellant had also filed an application to hear the petition by oral evidence on the same day.

[27] During the hearing of the petition on 27 April 2016, counsel for the respondents had raised an objection on the non-compliance of r 30(1) of the Companies (Winding-Up) Rules 1972 ('the Winding-Up Rules 1972'). The said rule provides:

> Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

[28] Counsel for the respondents argued that since encl 31 was filed out of time, the appellant had 'no leg to stand to oppose and/or to pursue any courses before the winding up Court'. He sought for order in terms of the petition on this ground alone. Counsel for the respondents did not argue on the merits of the petition in his written submission dated 25 April 2016 nor during the hearing on 27 April 2016.

[29] Counsel for the appellant then explained to the learned trial judge that he was only served with the petition on 11 April 2016. He argued that the appellant be given a right to be heard on the merits of the petition. Pertinently, counsel for the appellant made an oral application for an extension of time for encl 31 ('the oral application'). Counsel for the appellant had said:

> I make an oral application for any extension of time if required but the affidavits of the respondent must not be disregarded, there is a decision of His Lordship Tan Sri Richard Malanjum.

[30] The learned trial judge then fixed 13 May 2016 as the date for decision.

[31] On 28 April 2016, notwithstanding having made the oral application, the appellant filed a formal application under rr 193 and 194 of the Winding-Up Rules 1972 to abridge and/or enlarge time for encl 31 ('encl 39'). The said rules provides:

> *193 Enlargement or abridgment of time.*

The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.

194 Formal defect not to invalidate proceedings.

(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

(2) No defect or irregularity in the appointment or election of a receiver, liquidator, or member of a committee of inspection shall vitiate any act done by him in good faith.

[32] The appellant's main ground for encl 39 was that it should be given the right to be heard and that no injustice would be caused by allowing the application. The appellant had also stated that Yu Chee Hoe, the director of the appellant, was in Singapore for medical treatment and only came back to Kuching on 22 April 2016.

[33] On 12 May 2016, the learned trial judge had allowed the petition on the ground that encl 31 was not filed in compliance with r 30(1) of the Winding-Up Rules 1972. The petition was not heard on the merits and neither was encl 39. The learned trial judge then proceeded to stay the winding up order pending an appeal on the same.

THE APPEAL

[34] We find that the memorandum of appeal contains various grounds of appeal (pp 14–20 AR Vol 1). But, before us learned counsel for the appellant canvassed only one issue namely that the learned trial judge erred in fact and/or law in concluding that encl 31 had to be disregarded. It was submitted that the learned trial judge erred in disregarding encl 31 and in holding that the appellant had not complied with r 30(1) of the Winding-Up Rules 1972. Learned counsel for the appellant argued that though the appellant had not complied with r 30(1), it had through counsel made an oral application for an extension of time on 27 April 2016 and had subsequently made a formal application vide encl 39. The learned trial judge in her grounds nevertheless commented that 'the respondent did not even make an oral application to extend the time' (p 45 AR Vol 1).

[35] Learned counsel for the appellant further argued that the learned trial judge erred when Her Ladyship considered herself to be bound by the decision of the Court of Appeal in *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 and six other Court of Appeal decisions applying *Crocuses*'s principle (pp 41–42 AR Vol 1). As submitted by

learned counsel, *Crocuses* was recently revisited by the Federal Court in *Kilo Asset Sdn Bhd v Hew Tai Hong* [2016] 1 MLJ 785; [2016] 2 CLJ 365.

[36] In *Kilo Asset* the Federal Court held that the principle enunciated in *Crocuses* that r 30(1) of the Winding-Up Rules 1972 had to be adhered strictly, cannot be endorsed as correct. His Lordship Raus Sharif PCA said at pp 794–796 (MLJ); pp 375–376 (CLJ):

> [27] The decision and reasoning of the Court of Appeal in *Crocuses & Daffodils* was followed and adopted in number of cases (see *Jerry Ngiam Swee Beng v Abdul Rahman bin Mohd Rashid & Anor* [2001] 1 MLJ 567; [2001] 1 CLJ 844; *United Merchant Finance Bhd v Magpie Resources Sdn Bhd* [2001] 5 CLJ 464; *Unispan Formwork Sdn Bhd v Kim Choy Tractor Works Sdn Bhd* [2004] MLJU 160; [2004] 4 CLJ 151; *Dataprep (Malaysia) Sdn Bhd v Utas Lambang Sdn Bhd* [2009] 7 CLJ 163; *Delta Drive (M) Sdn Bhd v Hong Leong Finance Bhd* [2008] 4 MLJ 400; [2007] 4 CLJ 435; [2007] 5 AMR 93; *Anvest Corporation Sdn Bhd v Wong Siew Choong Sdn Bhd* [2008] 3 MLJ 334; [2008] 3 CLJ 317).
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> [28] *Learned counsel for the company submitted that we should endorse the decision of the Court of Appeal in Crocuses & Daffodils in view of its settled legal position. With respect, we are however not persuaded to do so.*
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> [29] *We are of the view that although the wordings of r 30(2) of the Winding-Up Rules seem to be mandatory in nature, one must not lose sight of the general powers of the court to abridge time as envisaged under rr 193 and 194 (1) of the same.* Those rules provide as follows:
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> > *193 Enlargement or abridgment of time*
> >
> > The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.
> >
> > *194 Formal defect not to invalidate proceedings.*
> >
> > (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.
>
> Further, s 221(2)(b) of the Companies Act 1965 is also a saving provision as it provides for the following:
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> > *221 Powers of Court on hearing petition*
> >
> > (1) On hearing a winding up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit, but the Court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.

A *(2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition —*

(a) …

B *(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any order of the Court;* (Emphasis added.)

[30] Bearing the above provisions in mind, we find that the powers of the court to extend or abridge time are not restricted by the words employed in r 30(2) of the Winding-Up Rules. Rules 193 and 194 of the Winding-Up Rules, together with
C s 221(2) of the Companies Act 1965 clearly give the court power to exercise its discretion to abridge the time prescribed in r 30(2). In our considered view, the Winding-Up Rules have to be read harmoniously, and the rigours of r 30(2) must be tempered by rr 193 and 194 of the Winding-Up Rules and s 221(2) of the Companies Act 1965.

D [31] As we alluded to above, it is crystal clear from a bare reading of r 194(1) of the Winding-Up Rules that: '… no proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion substantial injustice has been caused … and that the injustice cannot be remedied by any order of court'. Rule 193 further provides that the court can on
E application extend time to do any act under the Winding-Up Rules.

[32] Further, it is clear from s 355(1) of the Companies Act 1965 that technical non-compliance can only invalidate a proceeding under the Act if the court is of the view that substantial injustice has been or may be caused by such non-compliance and the injustice cannot be remedied by any court order. Section 355(1) of the
F Companies Act 1965 provides that:

355 Irregularities in proceedings

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any
G order of the Court.

[33] As for the reliance placed on the case of *Crocuses & Daffodils,* we note that the judgment in that case did not touch on the discretionary powers of the court under rr 193 and 194 of the Winding-Up Rules. Neither did it even consider the discretionary powers of the court under s 221(2)(b) of the Companies Act 1965
H which empowers the court to validate formal defects or irregularities. Thus, we are of the view that the reasoning of the Court of Appeal in *Crocuses & Daffodils* is not the conclusive authority for holding that the court has no discretion to abridge the time prescribed in r 30 of the Winding-Up Rules.

I **[37]** We further agreed that the learned trial judge's reliance on *Crocuses & Daffodils* was therefore misplaced as the said decision is only limited to its facts and it cannot be applied to a winding up petition under s 218(1)(i) as in the case at hand as Raus Sharif PCA clearly stated in *Kilo Asset* at pp 796–797 (MLJ); p 377 (CLJ):

[34] *It follows therefore that the Court of Appeal's decision in Crocuses & Daffodils must be construed to apply only to the facts peculiar to that case.* The facts in *Crocuses & Daffodils* clearly showed that there was inordinate delay, with the court observing that the service of all the affidavits on the bank had clearly and blatantly contravened the mandatory time prescribed under r 30(1) of the Winding-Up Rules. This was also a case where the petitioner had a judgment in hand obtained on 4 July 1991, where the original hearing date of the petition was 24 September 1992. It would therefore seem that there could be no excusable reason why the affidavits had to be filed out of time. *The Court of Appeal in Crocuses & Daffodils in deciding as it did was also swayed by the fact that the company's indebtedness had been established as long ago as 1984. The Court of Appeal emphasised that proceedings in the form of execution of judgment should never be allowed to drag and more so where such proceedings concerned the compulsory winding up of a company.*

[35] With the above in mind, with respect, *we find that learned counsel for the company's reliance on the case of Crocuses & Daffodils is misplaced. In our considered view, courts are not restricted by that case in exercising its powers under rr 193 and 194 of the Winding-Up Rules. Had it been intended that they should not be applied to r 30, the former would have said so in very clear terms.* (Emphasis added.)

[38] We observed that the learned trial judge had erroneously distinguished *Kilo Asset* on the ground that the application for an extension of time in *Kilo Asset* was filed before the hearing of the winding up petition. At pp 44–45 AR Vol 1, Her Ladyship stated as follows in her grounds:

In coming to a decision in this case I am fully aware that r 193 of the said rules gives the court the discretion to extend or abridge time and indeed the respondent has done so by way of filing a specific application for it ie encl 39 but only on 28 April 2016, a day after the hearing on 27 April 2016 and in the interim period before delivery of this decision. That is regrettably too late. For this reason, the Federal Court decision of *Kilo Asset Sdn Bhd v Hew Tai Hong* [2016] 1 MLJ 785; [2016] 2 CLJ 365 submitted by learned counsel for the respondent's secretary in his written submission is distinguishable because in that case the application for extension of time to file an affidavit in reply to the affidavit in opposition was filed before the hearing of the petition itself — but it was dismissed. In this case before me, the respondent did not even make an oral application to extend the time. Therefore there is simply no justification for me to exercise my discretion to do so under Rule 193. I also noted that the respondent has also made two other applications — to consolidate this petition with the nine part-heard cases (enclosure 37) and for the petition to be heard by way of viva-voce evidence (enclosure 29). All these applications do not in any way affect my decision to apply the law as laid down in the ratio of all the above-named cases to the facts of this case. It would therefore mean that the petition is unopposed and the averments deposed in the affidavit in support and the affidavit verifying the petition in support of the grounds for winding up the respondent should be accepted by me. Thus, make the winding-up order I must in terms of prayer 100 (A), (B) and (D) of the petition but given these unheard applications and the ongoing trial of nine cases in this bitter feud amongst the Yii/Yu family, and in the interest of justice I take it upon myself to stay the winding-up order which I am certain would be appealed even without any formal

application for the same. Or course, in the remotest of chance that my decision is accepted by the respondent, the stay would be automatically lifted. As for cost, since it is technically an unopposed petition, I fix it at RM5,000.00 to be paid by Yu Chee Hoe and Tony Yu Young Wee as prayed in the petition.

[39] We are of the view that the learned trial judge had not sufficiently considered the material facts before her which tainted Her Ladyship's decision in exercising her discretion judicially as required under the law. Material facts not judicially considered by the learned trial judge are as follows:

(a) that the oral application was made by the appellant's counsel during the hearing of the petition and as such Her Ladyship erred in forming the view that no such application was ever made;

(b) that rr 193 and 194 of the Winding-Up Rules 1972 do not state that any such application must be made before the hearing of a winding up petition; and

(c) that the Federal Court, in our view, did not limit its ratio to the applications filed before the hearing of the winding up petition. Therefore, it is obvious to us that in doing so in the present case, the learned trial judge had acted against the principle of stare decisis in limiting the ratio of the Federal Court in *Kilo Asset* (see *Perantara Properties Sdn Bhd v JMC Kelana Square* [2016] 5 CLJ 367).

[40] Further, we are of the view that it is the bounden duty of the learned trial judge to consider the oral application and/or the appellant's application in encl 39 as any delay to hear the same could not in our view occasioned a failure of justice to the respondents. The failure of the learned trial judge to consider the appellant's oral application and/or encl 39 application for an extension of time in fact caused prejudice and great injustice to the appellant which warrants appellate intervention. We echoed the view of Raus Sharif PCA in *Kilo Asset* at p 797 (MLJ); pp 377–378 (CLJ), as below:

> [38] We are of the unanimous opinion that courts when exercising its powers under rr 193 and 194 of the Winding-Up Rules must be wary of all the surrounding circumstances of each case. In exercising such discretion, courts must weigh the interest of both parties in accordance with the facts and circumstances of the each case. In the instant case, having considered the facts and circumstances, we find that no injustice, let alone substantial injustice, had been caused by the defect or irregularity. Further, it had not been shown to us that the injustice, if any, cannot be remedied by an order of the court. That being the case, in our considered view the High Court erred as it ought to have exercised its powers under rr 193 and 194 of the Winding-Up Rules in favour of the petitioner and allowed the affidavits to be used in the hearing of the petition on merits. In this case, we find that the irregularity did not cause any injustice to the company, and the delay by the

petitioner in filing the affidavits was inconsequential and could be safely condoned under rr 193 and 194 of the Winding-Up Rules and s 221(2)(b) and s 355 of the Companies Act 1965.

[41] On the facts and circumstances of this appeal, namely given the various applications and on-going trial on the dispute amongst the Yii/Yu family, we opined that justice of the case would be best served if the winding up petition be heard on the merits.

[42] For the abovestated reasons, we allowed the appellant's appeal. We set aside the order given by the High Court. We revert back the matter before the learned trial judge for consideration on the merits of the petition. We further ordered that the costs to be in the cause and deposit to be refunded.

Reported by Ashok Kumar